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Notes

OF STORKS AND FOXES: EMPLOYMENT TESTING AND BACK PAY

"Congress has now . . . provided that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox. On the contrary, Congress has now . . . required that the posture and condition of the job-seeker be taken into account. It has—to resort again to the fable—provided that the vessel in which the milk is proffered be one all seekers can use."

—Chief Justice Burger in
Griggs v. Duke Power Co.[1]

A Fox one day invited a Stork to dinner, and being disposed to divert himself at the expense of his guest, provided nothing for the entertainment but some thin soup in a shallow dish. This the Fox lapped up very readily, while the Stork, unable to gain a mouthful with her long narrow bill, was as hungry at the end of dinner as at the beginning. The Fox meanwhile professed his regret at seeing his guest eat so sparingly, and feared that the dish was not seasoned to her liking. The Stork said little but begged that the Fox would do her the honor of returning her visit. Accordingly, he agreed to dine with her on the following day. He arrived true to his appointment and the dinner was ordered forthwith. But when it was served up he found to his dismay that it was contained in a narrow necked vessel, down which the Stork readily thrust her long neck and bill, while the Fox was obliged to content himself with licking the neck of the jar.[2]

The enactment of Title VII of the Civil Rights Act of 1964[3] raised the hope of a bias-free job market. It has been the court

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1. 401 U.S. 424, 431 (1971). *Griggs* is discussed at note 15 *infra*.

2. Quoted in COOPER & RABB, EQUAL EMPLOYMENT LAW AND LITIGATION: *Materials for a Clinical Law Course* 27 (unpublished collection of materials for use in Columbia Law School's Employment Rights Project) [hereinafter cited as COOPER & RABB].

3. 42 U.S.C. §§ 2000e to 2000e-15 (1970), *as amended*, Equal Employment Opportunity Act of 1972, 42 U.S.C. §§ 2000e to 2000e-17 (Supp. II, 1972). In general Title VII proscribes discrimination in employment on the basis of race, color, religion, sex, or national origin; provides remedies for violations; and creates and defines the powers of the Equal Employment Opportunity Commission. For a comprehensive discussion of Title VII and cases arising thereunder, see *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109 (1971) [hereinafter cited as *Developments—Employment Discrimination*].

order, however, which has given substance to the legislative promise. In *Moody v. Albemarle Paper Co.*,[4] the United States Court of Appeals for the Fourth Circuit has aggressively interpreted the law regarding employment testing and back pay awards.

Moody and several of his black co-workers brought a class action suit against the Albemarle Paper Company based in North Carolina[5] and the local paperworkers union[6] pursuant to Title VII of the Civil Rights Act of 1964. Claiming that the company's seniority system and pre-employment testing procedures were discriminatory, the plaintiffs sought injunctive relief and back pay.

The district court found that Albemarle and the union local had engaged in illegal discriminatory employment practices.[7] Consequently it enjoined them from further discriminatory conduct and specifically directed the implementation of a plant-wide seniority system in place of the existing job seniority system which was found to have perpetuated the proscribed discrimination.[8] The defendants did not appeal these determinations. However, the court refused to order the abolition or modification of Albemarle's testing procedures and denied the plaintiffs' request for back pay. On these issues the plaintiffs appealed. On appeal, the United States Court of Appeals for the Fourth Circuit held that the testing procedures were inadequate because Albemarle had failed to demonstrate that the tests were job-related. Further, the court ruled that the district court had erred in refusing to grant back pay.[9] The court's resolution of these two issues may represent a further step toward ending employment discrimination.

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4. 474 F.2d 134 (4th Cir. 1973), *cert. granted*, 43 U.S.L.W. 3349 (Dec. 17, 1974). The defendant in *Moody* petitioned for rehearing *en banc*. In response to a question certified to it by the Fourth Circuit, the Supreme Court held that a senior judge may not participate in the decision of whether to rehear a case *en banc*. ___ U.S. ___, 41 L. Ed. 2d 358 (1974). The Court's ruling had the effect of denying the petition for rehearing.

5. Subsequent to the institution of the suit, the defendant mill underwent a change of corporate ownership; the court, however, deemed it convenient to refer to the corporate defendant by its former name. 474 F.2d at 136-37.

6. Originally, the international union was also named as codefendant; its motion to dismiss the suit against it was granted. Moody v. Albemarle Paper Co., 271 F. Supp. 27 (E.D.N.C. 1967).

7. Moody v. Albemarle Paper Co., 4 F.E.P. Cas. 561 (E.D.N.C. 1971).

8. For discussion of the role of seniority in employment discrimination, see Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598 (1969) [hereinafter cited as Cooper & Sobol]; Note, *Title VII: Seniority Discrimination and the Incumbent Negro*, 80 HARV. L. REV. 1260 (1967).

9. Judge Boreman concurred in the court's decision regarding testing procedures

TESTING PROCEDURES

Title VII expressly authorizes the use of "professionally developed ability test[s]"[10] in making employment decisions. It has been noted that, while the widespread use of occupational tests as employee selection devices is, in one sense, merely a manifestation of the American fascination with objective measures of ability, such tests can, by clothing employment decisions with apparent objectivity, be used as a shield against charges of discrimination.[11] Moreover, employers might unintentionally discriminate by the careless use of such tests.[12] The Fourth Circuit's decision in *Moody*, demanding a very strict standard of proof of conformity with federal regulations,[13] is an example of the increasingly sensitive judicial response to this situation.

Albemarle's use of certain testing instruments as part of its employee selection and promotion process began in 1958 as a result of a two-year period of experimentation. In 1963, on the basis of a brief study, the company decided to continue to employ one of the tests it had originally instituted, the Revised Beta Examination (Beta), a non-verbal device intended to measure the intelligence of both illiterates and people who simply do not speak English. In addition, because of anticipated increased mental demands on its workers occasioned by the growing use of printed plant machinery instructions, Albemarle adopted the Wonderlic Test, a verbal test purporting to measure general mental ability.

Albemarle's mill engaged in the pulp-to-paper manufacturing process. The plant's operations were organized departmentally along typical industry lines: eleven separate departments

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while Judge Bryan dissented. Judge Bryan concurred in the court's back pay decision—insofar as the employees had suffered economic loss by reason of the discriminatory seniority system—while Judge Boreman dissented.

10. 42 U.S.C. § 2000e-2(h) (1970). The legislative history of this section is discussed in *Developments—Employment Discrimination, supra* note 3, at 1123-26.

11. *Developments—Employment Discrimination, supra* note 3, at 1120-21.

12. It has been suggested that such tests have, in fact, been used carelessly. *Id.* at 1121 n.45 and accompanying text.

13. Equal Employment Opportunity Commission, Guidelines on Employee Selection Procedures, 29 C.F.R. §§ 1607.1-1607.14 (1970), interpreting 42 U.S.C. § 2000e-2(h). See note 10 *supra* and accompanying text. The Guidelines which permit the use of only job-related tests, were the subject of favorable comment by the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971), discussed at note 15 *infra*. Among the lower federal court cases according favorable comment to the Guidelines are United States v. Jacksonville Terminal Co., 451 F.2d 418 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972), and Hicks v. Crown Zellerbach Corp., 319 F. Supp. 314 (E.D. La. 1970).

The Guidelines may presently be found in 29 C.F.R. § 1607.1-1607.14 (1974).

contained a total of seventeen lines of progression or career ladders. Test results, supervisory evaluations, and seniority were the prime criteria for promotion. Since 1963, however, applicants for only eight departments, involving fourteen lines of progression, were required to score successfully on the tests.[14]

In 1971, prompted by the decision of the United States Supreme Court in *Griggs v. Duke Power Co.*[15] that employers have the burden of showing that employment qualifications having a disparate racial impact are related to job performance, Albemarle commissioned a study to correlate test results and job performance of its employees. The resulting validation study dealt with ten job groups in eight departments for which tests were required.[16] The performance of only higher level employees was considered in the study. The validation process was conducted for thirty percent of the positions for which Albemarle required tests. The test scores were then compared with evaluations by two supervisors of each worker's actual job performance. Since no job analyses[17] were undertaken for any of the positions, these evalua-

14. 474 F.2d at 137.

15. 401 U.S. 424 (1971). In *Griggs*, the Court ruled that when employment practices are shown to have an adverse racial impact, the employer must justify those practices by demonstrating "business necessity," which, at the least, requires a showing of "job-relatedness": "If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." *Id.* at 431.

The view has been expressed that "mere speculation or surmise by an employer will not constitute a sufficient justification" to satisfy the *Griggs* mandate. COOPER & RABB, *supra* note 2, at 90. This view finds support in the following statement by the *Griggs* Court:

> [The employer's high school completion requirement and intelligence test were adopted] . . . without meaningful study of their relationship to job-performance ability. Rather, . . . the requirements were instituted on the Company's judgment that they generally would improve the overall quality of the work force.

401 U.S. at 431.

In addition, the Court noted that "good intent or absence of discriminatory intent" is no defense where job-relatedness has not been proved. *Id.* at 432.

For concise summary of the factual setting in *Griggs*, see Note, *Employment Discrimination: The Burden Is On Business*, 31 MD. L. REV. 255, 256-58 (1971). See generally Blumrosen, *Strangers in Paradise*: Griggs v. Duke Power Co. *and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59 (1972) [hereinafter cited as Blumrosen].

16. 474 F.2d at 138.

17. The performance of a job analysis is the first step in any serious effort to determine the strength of the relationship between test performance and job performance. Job analysis involves the identification of each element of a job in order to determine the relative importance of each. Unless such an analysis is performed, just what the job is remains difficult to define. The selection of performance criteria is likewise difficult. "With a job analysis [,however,] a test selector can undertake a refined and intelligent choice of selection procedures. The job analysis will help isolate the performance criteria . . . with which test performance may be correlated." COOPER & RABB, *supra* note 2, at app. B, 8-9.

The Equal Employment Opportunity Commission, Guidelines on Employee Selection

tions were of a totally subjective nature—the only guideline for the supervisors' assessments was the directive to tell "just how well the guy can do the job when he's feeling right."[18]

The court of appeals was thus presented with the issue of whether a validation study of an employment test, incomplete in its construction and application, nonetheless suffices to meet the *Griggs* mandate.[19] Writing for the majority, Judge Craven held that all employment tests having an adverse impact on minority employment must be shown to be related to job performance in full accordance with the validation standards of the Equal Employment Opportunity Commission's Guidelines on Employee Selection Procedures[20] and that validation must be performed for each substantially discrete job category for which such tests are required.[21]

In an earlier decision, *Robinson v. Lorillard Corp.*,[22] the Fourth Circuit reviewed several cases[23] in which business necessity had been argued as a justification for maintaining discriminatory employment practices and concluded:

> Collectively these cases conclusively establish that the applicable test is not merely whether there exists a business

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Procedures, 29 C.F.R. §§ 1607.4-1607.14 (1974), reflect the importanct of job analysis. Section 1607.4(c) provides:

> Evidence of a test's validity should consist of empirical data demonstrating that the test is predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.

Section 1607.5(a) provides, in part: "[E]vidence for content or construct validity should be accompanied by sufficient information from job analyses to demonstrate the relevance of the content . . . or the construct. . . ." Section 1607.5(b)(3) provides, in part: "Whatever criteria are used they must represent major or critical work behaviors as revealed by careful job analyses."

18. 474 F.2d at 138.

19. The finding that Albemarle's testing procedures had an adverse racial impact was supported by plaintiff's exhibits, which demonstrated that ninety-six percent of the whites passed the Wonderlic Series while only sixty-four percent of the blacks did so. *Id.* at 138 n.1 and accompanying text.

The degree of difference between the test performance of minority groups and nonminority groups that will lead a court to conclude that the test has a legally significant adverse impact is, of course, open to conjecture. This problem is discussed in COOPER & RABB, *supra* note 2, at 81-84.

20. See note 13 *supra*.

21. 474 F.2d at 138-39. As the court observed, tests need not be validated for each job where there is no signficant difference between the various jobs. *Id.* at 139, citing 29 C.F.R. § 1607.4(c)(2) (1970) (unchanged by July 1, 1974, revision). However, Albemarle's failure to perform job analyses, see note 17 *supra*, precluded the inference that the jobs were substantially indistinguishable. 474 F.2d at 140.

22. 444 F.2d 791 (4th Cir. 1971).

23. *Id.* at 797-98.

> purpose for adhering to a challenged practice. The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact; *the challenged activity must effectively carry out the business purpose it is alleged to serve. . . .*[24]

In *Moody*, the court was presented with the opportunity to give more specific content to the *Robinson* standard. Inspired no doubt by the Supreme Court's unanimous reversal of its decision in *Griggs*,[25] the court definitively enunciated the Fourth Circuit's position on test validation requirements.

The court found Albemarle's testing procedures inadequate in two respects. The court initially took Albemarle to task for its incomplete validation[26]—specifically, its failure to conduct a "job

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24. *Id.* at 798 (emphasis added) (footnotes omitted). *See* United States v. Bethlehem Steel Corp., 446 F.2d 652, 662 (2d Cir. 1971) (using similar language in proscribing a seniority system).

25. 420 F.2d 1255 (4th Cir. 1970), *rev'd*, 401 U.S. 424 (1971) (where the Fourth Circuit ruled, in effect, that the job-relatedness of a test is, in itself, of no legal consequence; that a test is unlawful only if utilized with discriminatory intent or in a discriminatory manner).

26. "The validation process is the process of studying the relationship between ability to perform well on the test or other selection standard and ability to perform well in serving the employer's needs." COOPER & RABB, *supra* note 2, at 116. Cooper and Rabb proceed to describe the three basic validation techniques recognized by the "[t]he Guidelines and standard texts." *Id.* at 117. Except as otherwise noted, the following is based on Cooper and Rabb's discussion, *id.* at 17-19.

Criterion-related validation, the preferred technique, concerns the identification of the relationship between test performance and work performance as measured by some performance criterion. Test performance data may be derived through either a predictive or a concurrent study. While the predictive study is preferable because individuals are first tested and then put to work, thus enabling a statistical evaluation of how well the test predicted actual job performance, such studies are often not economically feasible. As an alternative, a concurrent study, in which the test is administered to present employees and their scores are compared with present work performance, may be undertaken. While predictive studies are the first choice of researchers, the EEOC has recognized their impracticability and has accepted carefully conducted concurrent studies. *Developments—Employment Discrimination*, *supra* note 3, at 1122-23.

Content validation, somewhat more subjective than criterion-related validation, involves a comparison of the content of the job and the test. For example, a typing test used for screening applicants for a typing job would be content-valid.

Construct validation, farthest removed of the three techniques from actual job performance, refers to the relationship between the mental and physical attributes needed on a job and a test which measures the same traits.

For additional materials dealing with this complex area see AMERICAN PSYCHOLOGICAL ASS'N, STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TEST AND MANUALS (1966); M. DUNNETT, PERSONNEL SELECTION AND PLACEMENT (1966); J. GUILFORD, FUNDAMENTAL STATISTICS IN PSYCHOLOGY AND EDUCATION (1965); Ghiselli, *The Generalization of Validity*, 12 PERSONNEL PSYCH. 397 (1959).

analysis." Job analysis is the first step in the process of determining whether there is a positive relationship between ability to perform well on a test and the capacity to perform acceptably in the target job. Analysis involved the task of defining a job's component elements and determining the relative importance of each. The aim of this procedure is to facilitate the identification of objective performance criteria with which test achievement can be compared.[27] Without the identification of such criteria, it is difficult to determine whether test performance accurately predicts job performance.

Proceeding in its critical analysis, the court implied that Albemarle took the easy way out with respect to the formulation of its supervisory guidelines: Albemarle ignored the EEOC's objective standards and simply compared test scores with ad hoc supervisory judgments of job elements and worker performance. Hiring and promotion decisions were made on the basis of these factors alone.[28]

In declaring both hiring and promotion procedures unacceptable and in formulating the Fourth Circuit's position on the matter, Judge Craven took note of two Fifth Circuit decisions. In *United States v. Jacksonville Terminal Co.*[29] the employer relied on a research study that demonstrated that test results were correlated with supervisors' assessments of each worker's potential achievement, but not his actual job performance. The Fifth Circuit ruled that business necessity had not been established. It observed that "*Griggs* demands more substantial proof, most often positive empirical evidence, of the relationship between test scores and [actual] job performance."[30] Subsequently the court remarked that the "safest validation method is that which conforms with the EEOC Guidelines."[31] It appears that the *Moody* court also found persuasive another Fifth Circuit case, *Rowe v. General Motors*.[32] While implicitly acknowledging that subjective

27. See note 17 *supra*.

28. The court noted that, assuming *arguendo* that Albemarle's validation procedures were proper, the district court nonetheless erred in (1) approving use of tests for lines of progression for which there had been *no* attempt at validation and (2) in sanctioning the defendant's use of *both* tests in regard to positions for which only *one* test had been validated. In so ruling Judge Craven rejected Albemarle's contention that such a use of the tests was justified under the business necessity test by reason of the company's initial uncertainty as to which line of progression new employees would enter. 474 F.2d at 139-40.

29. 451 F.2d 418 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972).

30. *Id.* at 456.

31. *Id.*

32. 457 F.2d 348 (5th Cir. 1972). In *Rowe* the court, in rejecting a promotion system

judgments, if fairly made, pose no problem, the *Moody* court endorsed the recognition in *Rowe* that a performance evaluation process which is not tied to previously-defined job elements can permit both unconscious and deliberate bias to affect ratings and employment decisions.[33]

Judge Craven put the Fourth Circuit on record for the first time as specifically adopting EEOC validation procedures as the proper method for determining the job-relatedness of employment tests.[34] Though there are exceptions, the case law is generally in accord with this position and with the court's decision not to be satisfied with an employer's good faith efforts which are incomplete in formulation and application.[35] For example, the Fifth Circuit in *United States v. Georgia Power Co.*[36] was confronted with facts similar in that respect to those in *Moody*. Although it gave the EEOC Guidelines a more qualified endorsement than did the *Moody* court, it did not hesitate to reject a validation study which lacked a statistically adequate sample of minority worker performance. Moreover, while the First Circuit in *Castro v. Reecher*[37] and the Second Circuit in *Vulcan Society*

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tied to foremen's recommendations, stressed *inter alia* that

> (i) The foreman's recommendation is the indispensible single most important factor in the promotion process.
>
> (ii) Foremen are given no written instructions pertaining to the qualifications necessary for promotion. (They are given nothing in writing telling them what to look for in making their recommendations.)
>
> (iii) Those standards which were determined to be controlling are vague and subjective.

Id. at 358. The *Rowe* court further declared that

> promotion/transfer procedures which depend almost entirely upon the subjective evaluation and favorable recommendation of the immediate foreman are a ready mechanism for discrimination against Blacks much of which can be covertly concealed and, for that matter, not really known to management.

Id. at 359.

33. *Cf.* Brown v. Gaston County Dyeing Mach. Co., 457 F.2d 1377 (4th Cir.), *cert. denied*, 409 U.S. 982 (1972). *See also* Cypress v. Newport News General & Nonsectarian Hosp. Ass'n, 375 F.2d 648 (4th Cir. 1967); Hawkins v. North Carolina Dental Society, 335 F.2d 718 (4th Cir. 1966); Meredith v. Fair, 298 F.2d 696 (5th Cir. 1962); Cooper & Sobol, *supra* note 8.

34. For an extensive enumeration of cases endorsing the EEOC Guidelines, see Note, *Application of the EEOC Guidelines to Employment Test Validation: A Uniform Standard for both Public and Private Employees*, 41 GEO. WASH. L. REV. 505, 524 n.118 (1973) [hereinafter cited as *Employment Test Validation*].

35. See Note, *Employment Testing: The Aftermath of* Griggs v. Duke Power Company, 72 COLUM. L. REV. 900, 903-904 (1972), and *Developments—Employment Discrimination*, *supra* note 3, at 1132-39, for an analysis of cases—effectively overruled by *Griggs*—which did not accept the view that employment tests must be job-related.

36. 474 F.2d 906 (5th Cir. 1973).

37. 459 F.2d 725 (1st Cir. 1972) (brought pursuant to 42 U.S.C. § 1983 (1970)).

of New York City Fire Department, Inc. v. Civil Service Commission[38] have not gone so far as to require actual statistical validation of employment tests, they have emphasized that employers bear a heavy burden of proving the job-relatedness of such tests. Judge Craven, tersely summarizing the attitude of the courts, remarked that "[civil rights complainants] are entitled to more solicitude under the law."[39] Indeed, it is now clear that test results become legally sufficient as a selection device only when compared with supervisory ratings which are based on identified and objective criteria found to be associated with successful job performance.

Judge Bryan's dissent shows concern for the practical burden of conforming with the *Griggs* job-relatedness test; however, this dissent also manifests a misunderstanding of the validation process and the role of job analysis in minimizing supervisory prejudices. When combined with an understandable sympathy for what he views as Albemarle's good faith efforts, Judge Bryan's misconceptions produce the following bizarre pronouncement: "Each of the aptitude tests is 'demonstrably a reasonable measure of job performance'. . . . Thus they are their own proof of their validation."[40] *Griggs*, however, requires not merely an attempt, but a successful showing of job-relatedness. Federal courts have likewise shown less willingness to rely so readily on supervisory impartiality.

The *Moody* test represents an important development of the Fourth Circuit's position—first presented in *Robinson*—that employers have a weighty obligation to ensure that their employ-

38. 490 F.2d 387 (2d Cir. 1973) *aff'g in part*, 353 F. Supp. 1092, 360 F. Supp. 1265 (S.D.N.Y. 1973). In a section 1983 suit alleging a discriminatory fire department test, Judge Friendly, in upholding the lower court, ruled that it was not necessary for an employment test to be validated predictively or concurrently. Rather, evidence of "careful preparation" would give rise to a rebuttable presumption that the test is job related. 490 F.2d at 395-96. The court manifested an understandable concern with the possible dangers of deepening judicial involvement in the analysis and application of advanced and esoteric statistical validation techniques. While such a position has merit, it carries with it the danger that courts, frustrated by complex statistical evidence, will gloss over crucial material and give undue weight to testimony of sincere and painstaking but substantively meaningless employer efforts to determine tests' job-relatedness. *See also* Bridgeport Guardians, Inc. v. Members of the Bridgeport Civil Service Comm'n, 482 F.2d 1333 (2d Cir. 1973).

39. 474 F.2d at 139. Though the court failed to reach a determination of the legal propriety of Albemarle's testing of only higher level employees as part of its validation effort, the implication is that prudent employers should derive representative scores from all position levels. *Id.* at 140 n.4. See Cooper & Sobol, *supra* note 8, at 1649.

40. 474 F.2d at 148, quoting Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971).

ment tests[41] do not have racially discriminatory ramifications. Employers in this jurisdiction have now been put on notice that EEOC Guidelines must be followed—at least to the extent that an employer's validation efforts produce results comparable to those which would flow from an actual EEOC study.[42]

The *Moody* holding does, however, leave a substantial residual concern. The economic burden of adhering to such stringent standards will not, of course, fall equally on all employers. In this vein it is interesting to note that recent testing decisions have involved comparatively large employers with the resources to finance and conduct acceptable validation studies. A case involving a relatively small business concern would quite likely elicit more judicial sympathy and possibly result in the approval of tests having a substantial adverse impact on minorities.[43]

BACK PAY

Title VII imparts to federal courts the authority to grant relief, in the form of back pay awards,[44] from unlawful employment practices. Although the granting of such relief is discretionary,[45] courts have been especially mindful of the remedial aims

41. Other selection criteria have been found to have an adverse impact on minorities. See, e.g., Adams v. Miami Police Benevolent Ass'n, Inc., 454 F.2d 1315 (5th Cir. 1972), *cert. denied*, 409 U.S. 843 (1972) (veto rights of existing members), and Gregory v. Litton Systems, Inc., 316 F. Supp. 401 (C.D. Cal. 1970), *aff'd as modified*, 472 F.2d 631 (9th Cir. 1972) (arrest record requirements).

42. Recent commentary has noted that while *Griggs* proscribed tests having an adverse impact and no manifest relation to job performance, it left unanswered questions concerning the nature and amount of evidence required to determine whether a test is sufficiently job-related. *Employment Test Validation*, *supra* note 34; Note, *Employment Discrimination: The Burden Is On Business*, 31 MD. L. REV. 255, 264-65 (1971). The *Moody* decision, requiring as it does complete and properly-conducted validation studies in accordance with EEOC Guidelines, is a clear response to these concerns.

43. For comment on this troublesome area, see generally Blumrosen, *supra* note 15, at 100-07; Ruch & Ash, *Comments on Psychological Testing*, 69 COLUM. L. REV. 608 (1969); Note, *Legal Implications of the Use of Standardized Ability Tests in Employment and Education*, 68 COLUM. L. REV. 691 (1968); *Employment Test Validation*, *supra* note 34, at 532-36; *Developments—Employment Discrimination*, *supra* note 3, at 1139-40.

44. The back pay provisions of Title VII are modeled after section 10(c) of the National Labor Relations Act, 29 U.S.C. § 160(c) (1970), which authorized "affirmative action including reinstatement of employees with or without back pay." For discussion and analysis of the influence of the NLRA on Title VII remedies, see Davidson, *"Back Pay" Awards Under Title VII of the Civil Rights Act of 1964*, 26 RUTGERS L. REV. 741 (1973) [hereinafter cited as Davidson]; Vass, *Title VII: Legislative History*, 7 B.C. IND. & COMM. L. REV. 431 (1966). For a detailed discussion of damage remedies under Title VII, see DEVELOPMENTS—EMPLOYMENT DISCRIMINATION, *supra* note 3, at 1259-69.

45. 42 U.S.C. 2000e-5(g) (Supp. II, 1972), provides:

> [T]he court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay. . . .

of Title VII and have given a broad reading to the Act's relief provisions so as to remedy all discrimination.[46]

In the instance case, however, despite finding that Albemarle's job seniority system had perpetuated discrimination, the trial court reasoned that an award of back pay was unjustified in view of the plaintiffs' lengthy delay in claiming back pay and the defendant's apparent good faith.[47] Finding this reasoning unpersuasive, the Fourth Circuit directed the trial court, on remand, to award back pay.

The back pay issue in *Moody* presented the Fourth Circuit with an additional opportunity to consider its holdings in *Robinson*.[48] The *Moody* court not only found *Robinson* persuasive but deemed it appropriate to reiterate and extend that decision's back pay pronouncements.

Despite the dissent's attempt to distinguish the two cases,[49] the facts in *Moody* and *Robinson* raising the back pay issue are remarkably similar.

The plaintiffs in *Moody* initially brought suit in August, 1966.[50] In response to Albemarle's motion for summary judgment

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The courts' power to deny back pay in the face of an established violation of Title VII has been exercised in the following cases: United States v. St. Louis-San Francisco Ry. Co., 464 F.2d 301 (8th Cir. 1972) (en banc), *cert. denied*, 409 U.S. 1116 (1973) (denial of back pay based, in part, upon difficulty of computation of loss suffered by each employee affected by defendant's discriminatory seniority system); Schaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002 (9th Cir. 1972) (back pay award limited because of employer's reliance on similar legislation); Manning v. Int'l Union, 466 F.2d 812 (6th Cir. 1972), *cert. denied*, 410 U.S. 946 (1973) (where employer did not have benefit of judicial interpretation of state's female protective statute, court's denial of back pay to women discriminated against under the statute held not an abuse of discretion); Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969) (deduction, not denial, of back pay from unemployment compensation upheld as a proper exercise of discretion); Lea v. Cone Mills Corp., 301 F. Supp. 97 (M.D.N.C. 1969), *aff'd in pertinent part*, 438 F.2d 86 (4th Cir. 1971) (denial of back pay approved where plaintiff was found to have been only testing an employer's hiring practices, not earnestly seeking employment); Richards v. Griffith Rubber Mills, 300 F. Supp. 338 (D. Ore. 1969) (cases where back pay was refused by reason of employer's good faith reliance on state laws limiting working hours for women).

46. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971); Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972); United States v. Dillon Supply Co., 429 F.2d 800 (4th Cir. 1970); Johnson v. Georgia Highway Express Co., 417 F.2d 1122 (5th Cir. 1969); Jenkins v. United Gas Corp., 400 F.2d 28 (5th Cir. 1968) (compensatory pay granted for refusal to promote).

47. Moody v. Albemarle Paper Co., 4 F.E.P. Cas. 561, 570 (E.D.N.C. 1971).

48. *Supra* note 22.

49. 474 F.2d at 145. Judge Boreman argued, in part, that *Robinson* is distinguishable from *Moody* in that the *Moody* plaintiffs' lengthy delay before retracting their disclaimer of back pay led to significantly greater prejudice to the employer's defense than was present in Robinson. The dissent is dealt with more fully at text accompanying notes 80-86 *infra*.

50. 4 F.E.P. Cas. at 562.

filed in November, 1966,[51] the plaintiffs stated that they were seeking, as their *exclusive* remedy, injunctive relief from the company's discriminatory seniority and testing policies. Though the plaintiffs initially expressed no desire for monetary relief, they did communicate such an interest several years later, in June, 1970.[52]

In *Robinson*, the plaintiffs' complaint did not contain a request for back pay; it simply asked for "such other additional relief as may appear to the Court to be equitable and just"[53] in the face of Lorillard's discriminatory seniority system. At an ensuing pretrial hearing, the plaintiffs' attorneys declared that the suit was one for injunctive relief and disclaimed any plans to argue for recovery of lost wages. However, the plaintiffs did present a belated claim for back pay after trial but before judgment had been entered.[54]

The manifest question presented in each case, then, was whether Title VII's back pay remedy had been waived. The Fourth Circuit responded in the negative in both instances.

The majority in *Moody* relied in part on the Seventh Circuit's 1969 decision in *Bowe v. Colgate-Palmolive Co.*,[55] the first major Title VII case that involved back pay as a remedy for an entire class.[56] The suit was brought by female workers who had been laid off because of Colgate's sex discrimination.[57] The court ordered back pay for the plaintiffs and stated:

> [T]he clear purpose of Title VII is to bring an end to the

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51. 474 F.2d at 145 n.14.

52. *Id.* at 145 n.15.

53. 444 F.2d at 802.

54. *Id.* at 803.

55. 416 F.2d 711 (7th Cir. 1969).

56. Hill, *The New Judicial Perception of Employment Discrimination—Litigation Under Title VII of the Civil Rights Act of 1964*, 43 U. COLO. L. REV. 243, 256 (1972) [hereinafter cited as Hill].

Judge Boreman suggests that, assuming that back pay relief should be granted, it is appropriate only for the named plaintiffs in view of the plaintiffs' express disclaimer of an intent to seek back pay for all class members. 474 F.2d at 146. However, Title VII itself contains no bar to back pay recovery by class members, and most courts considering the issue have ruled that class treatment of the back pay remedy is appropriate. In addition to *Robinson*, *supra* note 22, and *Bowe*, *supra* note 55, examine Sprogis v. United Airlines, Inc., 444 F.2d 1194, 1201-02 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971) (not a class action), where a back award for all victims of discrimination without regard to whether they were parties to the suit was recognized as a possibility on remand. But see Franks v. Bowman Transp. Co., 5 F.E.P. Cas. 421 (N.D. Ga. 1972). See generally Davidson, *supra* note 44, at 741-51.

57. The respondents had restricted female employees to jobs requiring the lifting of no more than thirty-five pounds.

> proscribed discriminatory practices and to make whole, in a pecuniary fashion, those who have suffered by it. To permit only injunctive relief in the class action would frustrate the implementation of the strong Congressional purpose expressed in the Civil Rights Act of 1964.[58]

Significantly, the *Bowe* remedy was granted in other jurisdictions, for example, in *Laffey v. Northwest Airlines, Inc.*,[59] and *Robinson v. Lorillard Corp.*[60] In granting class relief in the form of back pay, these cases reflect the proposition that back pay awards serve to vindicate the public policy embodied in Title VII—elimination of all employment discrimination.[61]

In this context, then, Judge Craven proceeded to dispose of the "waiver-by-laches" and disclaimer arguments advanced by the appellees and Judge Boreman's dissent.[62] The dissent attempted to distinguish *Robinson*—where the plaintiffs had disclaimed at a pretrial hearing an intent to seek back pay—from *Moody*—where the complainants had made a similar disclaimer during a preliminary phase of the suit—by arguing that Albemarle's reliance on the plaintiffs' initial disclaimer had significantly prejudiced the mill's bargaining position and defense. Judge Craven was not persuaded by the argument. He noted that:

> [B]ecause the obligation to provide back pay stems from the same source as the obligation to reform the seniority system, any general defenses relevant to the back pay award were equally relevant to the suit for injunctive relief. . . . The defendants have in no way been prejudiced by the belated claim.[63]

Having rejected the waiver argument as a basis for upholding the trial court's decision, the court proceeded to consider whether it should, nonetheless, follow the traditional attitude of reluctance to reverse for "abuse of discretion" and thus affirm the

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58. 416 F.2d at 720.

59. 321 F. Supp. 1041 (D.D.C. 1971) (holding that class action could be maintained); 374 F. Supp. 1382 (D.D.C. 1974) (ordering back pay).

60. 444 F.2d 791 (4th Cir. 1971). See Davidson, *supra*, note 44, at 748, and Hill, *supra* note 56, at 254-55, for citations to additional cases in which class back pay awards were made.

61. *See, e.g.*, Jenkins v. United Gas Corp., 400 F.2d 28 (5th Cir. 1968); Oatis v. Crown Zellerbach Corp., 398 F.2d 496 (5th Cir. 1968). *Cf.* Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968) (under Title II).

62. 474 F.2d at 146 n.16.

63. *Id.* at 141, quoting *Robinson, supra* note 22, at 803. *See also* United v. Hayes Int'l Corp., 456 F.2d 112 (5th Cir. 1972), as authority to the effect that the issue of back pay in civil rights cases should be determined even if not raised until after trial.

decision. Judge Craven, exhibiting little patience with this attitude, bluntly remarked: "Where a district court fails to exercise its discretion with an eye to the purposes of the Act, it must be reversed."[64]

Judge Craven then announced the Fourth Circuit's standard with respect to the awarding of back pay: judicial discretion notwithstanding, back pay—limited to damages actually suffered—will be awarded as a matter of course to a prevailing plaintiff in the absence of "special circumstances that would render such an award unjust."[65] In so holding the court drew an analogy, as it did in *Lea v. Cone Mills*,[66] to *Newman v. Piggie Park Enterprises, Inc.*,[67] a Title II (public accommodations) case, in which the Supreme Court held, in part, that attorneys' fees should be routinely granted.

Judge Craven's application of the Act so as to favor employee relief would seem to be in accord with recent changes in the Act. After a review of the effect of 1972 amendments[68] on remedies under Title VII, the authors of a recent article conclude that Congress "seem[s] to have adopted terms which reflect the reasoning of decisions giving wide reading to the remedial powers of the Act."[69] They find support for this view in the section by section analysis of the Equal Employment Opportunity Act of 1972[70]

64. 474 F.2d at 141-42. The court, citing *Robinson, supra* note 22, was likewise unimpressed with the contention—advanced by both the district court and Albemarle—that back pay relief is inappropriate in cases where the defendant acted in good faith. To the same effect, see *Bowe, supra* note 55, and Johnson v. Goodyear Tire & Rubber Co., 349 F. Supp. 3 (S.D. Tex. 1972). But see Kober v. Westinghouse Electric Corp., 480 F.2d 240 (3d Cir. 1973).

65. 474 F.2d at 142. As examples of circumstances which may justify the refusal or limitation of back pay awards the majority cited Schaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002 (9th Cir. 1972) (where the employer relied on state labor law which limited maximum working hours of women), and Le Blanc v. Southern Bell Tel. & Tel. Co., 333 F. Supp. 602 (E.D. La. 1971), *aff'd per curiam*, 460 F.2d 1228 (5th Cir.), *cert. denied*, 409 U.S. 990 (1972) (involving reliance on a subsequently overturned state law).

66. 438 F.2d 86 (4th Cir. 1971).

67. 390 U.S. 400 (1968).

68. Equal Employment Opportunity Act of 1972, 42 U.S.C. §§ 2000e to 2000e-17 (Supp. II, 1972), *amending* 42 U.S.C. §§ 2000e to 2000e-15 (1970). The portion of the Act which affects Title VII's relief provisions changed only the scope of the back pay remedy: "Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission." 42 U.S.C. § 2000e-5(g) (Supp. II, 1972). For discussion of the 1972 amendments to Title VII, see Sape & Hart, *Title VII Reconsidered: The Equal Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824 (1972) [hereinafter cited as Sape & Hart].

69. Sape & Hart, *supra* note 68, at 880.

70. Pub. L. No. 92-261, 86 Stat. 103, *amending* 42 U.S.C. §§ 2000e to 2000e-15 (1970).

that accompanied a House-Senate Conference Committee Report: " 'The provisions of this subsection [706(g)] are intended to give courts wide discretion in exercising their equitable powers *to fashion the most complete relief possible.*' "[71]

Although, as previously noted, the Fourth Circuit's generous position in regard to back pay awards is shared by other courts,[72] some jurisdictions have laid down standards which may significantly circumscribe such awards. In a recent Title VII decision, *United States v. Georgia Power Co.*,[73] the Fifth Circuit stated that trial courts should consider limitations and laches in determining the appropriateness and amount of back pay awards. In addition, district courts were directed to consider:

> Factors of economic reality (*i.e.*, the relative expense of accurate determination of individual rights vis-á-vis the amounts involved) and, most assuredly, the physical and fiscal limitations of the court to properly grant and supervise relief.[74]

The Eighth Circuit, in *United States v. St. Louis-San Francisco Railway Co.*[75] also placed a significant limitation on the availability of back pay by denying back pay to all members of the complaining class because of admittedly difficult problems of proof presented by some of the plaintiffs' back pay claims. The concern expressed in both *Georgia Power Co.* and *St. Louis-San Francisco Railway Co.* for the burdens posed by computation of back pay awards is certainly legitimate, but additional judicial experience in the area and increasing use of the master available under Rule 53[76] may well serve to diminish such apprehensions.

As noted, the circuits seem not to be in complete agreement on the breadth of the trial court's discretion. While the Sixth Circuit has taken a position substantially in accord with *Moody* by ruling "that the grant of [back pay] authority under title VII should be broadly read and applied [so as generally to] mandate an award of back pay,"[77] the Third Circuit has taken a somewhat

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71. Sape & Hart, *supra* note 68, at 881, quoting: 118 CONG. REC. S 3462 (daily ed. March 6, 1972); 118 CONG. REC. H 1863 (daily ed. March 8, 1972) (emphasis added).

72. *See* notes 55-61 *supra* and accompanying text.

73. 474 F.2d 906 (5th Cir. 1973).

74. *Id.* at 922. *But see* Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364 (5th Cir. 1974), where the Fifth Circuit considerably softened its stance with respect to the awarding of back pay.

75. 464 F.2d 301 (8th Cir. 1972) (en banc), *cert. denied*, 409 U.S. 1116 (1973).

76. FED. R. CIV. P. 53(b). See Davidson, *supra* note 44, at 753-70 for detailed discussion of the problems associated with awarding and computing back pay in Title VII suits.

77. Head v. Timken Roller Bearing Co., 496 F.2d 870, 876 (6th Cir. 1973). *But cf.*

more restrained approach. In *Kober v. Westinghouse Electric Corp.*[78] the court upheld the trial judge's denial of back pay where the defendant had relied on a state statute before judicial resolution of its conflict with federal law. The court apparently found the Fourth and Seventh Circuits' positions on back pay unpersuasive,[79] and, emphasizing trial courts' discretion in deciding whether to award back pay, ruled that back pay is not mandatory.

Judge Boreman's partial dissent[80] in *Moody* manifests a basic philosophical divergence from the path the majority has taken in pursuit of its determination to give full effect to Title VII's remedies. The crux of the dissent's position is a refusal to accept Judge Craven's equation of Title VII cases, which have granted attorneys' fees as a matter of course,[81] with a similar position relative to back pay awards. Judge Boreman draws the inference that, because the authority for granting attorneys' fees and back pay appears in two separate sections of Title VII,[82] Congress intended that they should be treated independently. The dissent argues further that back pay should receive no greater presumption of appropriateness than other equitable remedies.

The dissenting judge was also disturbed by the plaintiffs' initial back pay disclaimer and the belated reversal of that position. Rule 54(c) is cited to the effect that federal courts "shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party *has not demanded* such relief in his

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Manning v. Int'l Union, 466 F.2d 812 (6th Cir.), *cert. denied*, 410 U.S. 946 (1973), a case denying back pay in the face of proved discrimination where the employer was confronted with conflicting state and federal laws.

78. 480 F.2d 240 (3d Cir. 1973).

79. *Id.* at 247.

80. 474 F.2d at 142. Judge Bryan concurred in the court's back pay decision insofar as it served as a means by which the victims of Albemarle's discriminatory job seniority system could be compensated. 474 F.2d at 148.

81. In Lea v. Cone Mills Corp., 438 F.2d 86 (4th Cir. 1971), also a Title VII case, Judge Boreman dissented from the court's liberal position regarding the awarding of attorney's fees. After suggesting that the plaintiffs in *Lea* were not footing the legal services bill and that therefore the court should deny them attorney's fees, Judge Boreman caustically observed:

> [T]his entire case smacks of nothing but manufactured litigation and, to employ a rather harsh but well known characterization—"ambulance chasing"—with the plaintiffs themselves serving merely as puppets or as pawns in the game. To me, these "special circumstances" "would render such an award [of counsel fees] unjust. . . ."

438 F.2d at 90.

82. 42 U.S.C. § 2000e-5(k) (1970), authorizes attorney's fees. 42 U.S.C. § 2000e-5(g) (Supp. II, 1972), provides for back pay.

pleadings."[83] With this procedural straw man set up, Judge Boreman moves to knock him down, declaring that Rule 54(c) should not be used as a basis for the grant of back pay where a party had expressly disclaimed such relief.[84] While the plaintiffs might have treated Albemarle more equitably, their disclaimer hardly served as a formal, binding commitment justifying complete reliance by the defendant. As Judge Sobeloff remarked in *Robinson*, Rule 54(c) "has been liberally construed leaving no question that it is the court's duty to grant whatever relief is appropriate on the basis of the facts proved. The pleadings serve only as a rough guide to the nature of the case."[85]

The most telling questions raised by the dissent relate to the financial implications of back pay awards in Title VII suits.[86] Concern for the effect on the business community of "potentially enormous" awards underlies Judge Boreman's dissent. For example, the NAACP Legal Defense Fund and Lorillard Corporation recently settled a case for five hundred thousand dollars in back pay for the complaining class.[87] Even more notable are the out-of-court settlements made by AT&T[88] and the steel industry[89] of $15 million and $30.9 million, respectively, in back pay in suits brought by the government. Congressional reaction to such developments echoes Judge Boreman's sentiments. While the 1972 amendments to Title VII generally left the nature of the Act's remedies unchanged, the scope of the back pay remedy was narrowed significantly. Back pay awards, heretofore unfettered, are now limited to a two-year period prior to the filing of a complaint with the EEOC.[90] Previously, the EEOC had argued[91] and at least one case had indicated,[92] that such awards could be calculated from July 2, 1965, the effective date of Title VII.

Although business interests have apparently[93] succeeded in limiting their monetary liability under Title VII, Judge Boreman's concern remains important, for civil rights litigants may

83. 474 F.2d at 145, quoting FED. R. CIV. P. 54(c) (emphasis added).
84. 474 F.2d at 146.
85. 444 F.2d at 803.
86. 474 F.2d at 146 n.16.
87. COOPER & RABB, *supra* note 2, at 349.
88. Davidson, *supra* note 44, at 741.
89. Wash. Post, Apr. 16, 1974, § 1, at 1, col. 2.
90. See note 68 *supra*.
91. Sape & Hart, *supra* note 68, at 881 n.370.
92. *See* Amalgamated Meat Cutters & Butcher Workmen, AFL-CIO, Local 340 v. Safeway Stores, Inc., 4 F.E.P. Cas. 510, 512 (D. Kan. 1972).
93. *But see* Stamps v. Detroit Edison Co., 365 F. Supp. 87 (E.D. Mich. 1973), a Title VII case in which the court awarded four million dollars in punitive damages.

yet avoid the Title VII restriction on back pay by bringing suit pursuant to 42 USC section 1981,[94] a section originally enacted as part of the Civil Rights Act of 1866.

Relying on the Supreme Court decisions in the housing area,[95] federal courts have granted monetary relief in employment discrimination suits brought under section 1981.[96] Section 1981 contains no time limitations comparable to those of Title VII as amended. One commentator succinctly described the implications as follows:

> Title VII courts have measured back pay awards from the effective date of the statute. Although section 1981 has only recently been applied against private employers, the Supreme Court indicated in *Jones* that its interpretation would not alter or overrule past law. *On this basis, the computation date for damages under section 1981 could be 1866, limited only by the plaintiff's availability for employment and maybe by the applicable statute of limitations.*[97]

It is debatable, however, whether the huge back pay claims likely to be made under section 1981 will in fact be sustained. Courts may well choose to heed the Congressional purpose evident in Title VII's new back pay limitation; if they do not, rapid moves to amend section 1981 may be forthcoming.

Despite the difficulties associated with excessive awards, timing of claims for relief, questions of mitigation,[98] and computation of back pay for a large class,[99] the Fourth Circuit's pre-

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94. 42 U.S.C. § 1981 (1970), provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

95. For an overview of recent developments in this area, *see* Comment, *Racial Discrimination in the Private Housing Sector: Five Years After*, 33 MD. L. REV. 289 (1973).

96. *See, e.g.*, Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377 (4th Cir.), *cert. denied*, 409 U.S. 982 (1972); Young v. Int'l Tel. & Tel. Co., 438 F.2d 757 (3d Cir. 1971); Sanders v. Dobbs Houses, Inc., 431 F.2d 1097 (5th Cir. 1970), *cert. denied*, 401 U.S. 948 (1971); Waters v. Wisconsin Steel Works of Int'l Harvester Co., 427 F.2d 476 (7th Cir.), *cert. denied*, 400 U.S. 911 (1970).

97. Larson, *The Development of Section 1981 as a Remedy for Racial Discrimination in Private Employment*, 7 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 56, 98 (1972) (footnote omitted) (emphasis added).

98. *See* Lea v. Cone Mills, 438 F.2d 86 (4th Cir. 1971) (articulating a complainant's duty to mitigate by seeking other employment). *See generally* Davidson, *supra* note 44, at 753-70.

99. *See generally* Davidson, *supra* note 59, at 769-67, for discussion of the relevant considerations in computing back pay awards.

sumption of back pay relief has given greater force to an already potent weapon. Indeed, since Title VII does not provide for criminal penalties and injunctions operate only prospectively, back pay may well be the major deterrent against violation.[100] In sum, it would seem fair to say that in light of *Moody*, class back pay awards and settlements may be expected to have a powerfully persuasive effect on indifferent as well as recalcitrant segments of the business community.

Conclusion

The *Moody* decision offers two lessons to employers in the Fourth Circuit. First, the EEOC Guidelines, which had been suggested by the Supreme Court in *Griggs* as a model, now serve as the legal yardstick by which employment testing devices are to be measured. Second, and potentially the more threatening to prospective defendant-employers, is the *Moody* court's expectation that trial courts will customarily grant back pay awards as a remedy for the past effects of discriminatory practices.

For discussion of the propriety and implications of granting legal—as opposed to equitable—remedies under Title VII, see *Developments—Employment Discrimination, supra* note 3, at 1259-68.

100. *See generally* Rosenthal, *Employment Discrimination and the Law*, 407 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 91, 95-96 (1973).